

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In Case No. 2006-0512, State of New Hampshire v. Donald McMullin, the court on July 9, 2007, issued the following order:

The defendant, Donald McMullin, appeals his conviction for class A misdemeanor possession of marijuana. He argues that the trial court erred in denying his motions to suppress because the search warrant failed to establish probable cause and the affiant recklessly omitted material information from the application. We affirm.

To establish probable cause, the affiant need only present the magistrate with sufficient facts and circumstances to demonstrate a substantial likelihood that the evidence or contraband will be found in the place to be searched. State v. Zwicker, 151 N.H. 179, 185 (2004). We review the superior court's order on a motion to suppress de novo, except as to findings of controlling facts. Id. We assign great deference to the magistrate's determination of probable cause, and do not invalidate a warrant by interpreting the evidence in a hypertechnical sense. Id.

In his first argument, the defendant does not contest the accuracy of the facts set forth in the search warrant application, but rather argues that because he was never observed purchasing, using or otherwise possessing Diazinon and was never observed near his neighbor's well, the State failed to establish probable cause.

The search warrant application and supplemental information provided by the investigating police officer indicated that: (1) a substance was found in the neighbor's well that was identified as Diazinon, a pesticide that had to be introduced into the well; (2) the well was located 300-350 feet down the neighbor's driveway on the edge of the defendant's driveway; (3) there was a history of conflict between the defendant and the neighbor; and (4) the neighbor was expected to be a witness in criminal cases pending against the defendant.

The evidence supported a finding of substantial likelihood that the Diazinon had been deliberately placed in the well; the remote location of the well and the lengthy history of hostility between the defendant and his neighbor supported a further finding that Diazinon would be found on the defendant's property.

The defendant also argues that the investigating officer recklessly omitted material information from the search warrant application. In his affidavit in support of the search warrant, the investigating officer provided a one-sentence synopsis of twenty-two reports arising from complaints made by either the neighbor or the defendant. The defendant argues that because some of the complaints filed by the neighbor were later determined to be unfounded, they undermined the neighbor's credibility and weakened any evidence that the defendant had motive to contaminate the well; therefore, he contends, the

synopsis was inaccurate and the officer's failure to provide copies of the actual complaints in support of the search warrant application constituted a material misrepresentation.

Whether an affidavit contains a misrepresentation and whether it was material are questions of law, which we review de novo. State v. Stern, 150 N.H. 710-11 (2004).

Having reviewed the record before us, we conclude that any omission in the search warrant application was not material. See State v. Gubitosi, 151 N.H. 764, 768 (2005) (materiality determined by whether if omitted statements included in affidavit there would still be probable cause). The information presented to the magistrate demonstrated a long history of animosity between the defendant and his neighbor in which each filed complaints against the other; that the defendant may have been unaware of some of the complaints and that the magistrate may have been unaware that some of the complaints were classified as unfounded does not alter the magistrate's finding of acrimony. As the trial court noted in its order on the defendant's motion to suppress, the sheer volume of complaints supported such a finding.

Given the record before us, we find no error.

Affirmed.

DALIANIS, GALWAY and HICKS, JJ., concurred.

**Eileen Fox,
Clerk**